IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO., AN OHIO CORPORATION,

Petitioner,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,

Respondent.

BRIEF OF RESPONDENT.

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Respondent.

BRIEF OF RESPONDENT

OPINIONS DELIVERED IN THE COURTS BELOW

This matter was originally presented to the Board of Tax Appeals of the department of taxation of the state of Ohio. Its opinion dated March 19, 1943, sustaining the assessments made by the tax commissioner, is unofficially re-

ported in 26 Ohio Opinions, 25. On appeal to the Supreme Court of Ohio, the decision of the Board of Tax Appeals was affirmed on November 24, 1943, the opinion being officially reported in 142 O. S., 235, and also reported in 51 N. E. (2d), 723. These opinions are reprinted in the Record at pages 94 and 104, respectively.

STATEMENT OF THE CASE.

A. The Case Below.

The progress of the case below is correctly set forth in the petitioner's brief and for that reason will not be restated herein.

B. Statement of the Facts.

While the facts have been set forth in elaborate detail in the petitioner's brief and generally are correctly stated therein, it appears appropriate to include in this brief the following summary of the facts for the purpose of calling attention to certain matters apparently deemed inconsequential by the petitioner.

The Hooven & Allison Company, the petitioner herein, is an Ohio corporation which was organized in 1888, having its principal place of business at Xenia, Ohio. It is engaged in the manufacture of cordage, twine, packing and oakum binder twine. In its manufacturing processes during the years in question the petitioner used large quantities of fibers, such as hemp, sisal, abacá, istle, and the like. These fibers were produced principally in foreign countries and the Philippines.

As concerns the present review, the petitioner made inter-county returns of its personal and intangible property

for the tax years 1938, 1939 and 1940. Upon audit of these returns, the tax commissioner determined that the petitioner had failed to list certain fibers which it owned and held in its warehouses preparatory to running the same through its mills. The commissioner corrected these returns by adding to the raw material inventories $467,530 for 1938, $274,830 for 1939, and $221,790 for 1940. The petitioner's appeal and the present review is limited to the validity of these additions.

By stipulation (Ex. 2, R. 89), it is agreed that the added raw material inventories consisted of fibers contained in their original packages which were brought into the United States from foreign countries and from the Philippine Islands. It is stipulated that these fibers came from the sources and had values as follows:

Year	Source	Value
1938	Countries other than the Philippine Islands	$410,030
1938	Philippine Islands	57,500
1939	Countries other than the Philippine Islands	225,080
1939	Philippine Islands	49,750
1940	Countries other than the Philippine Islands	191,990
1940	Philippine Islands	29,800

These fibers were purchased through New York brokers who acted as agents for the producers in the Philippine Islands and in foreign countries. Written purchase contracts (R. 70A to 70D, 74A, 80A, 84A to 84D, 88A and 88B) were signed by the petitioner and the brokers on behalf of the producers (R. 40), stating the type and the approximate quantity of fibers the petitioner contracted to buy and the price to be paid. All of these contracts were "landed contracts" (R. 41, 48, 58, 59, 68 and 82), that is, the sellers

were required as a part of their contracts to deliver the goods f. o. b. on specified docks in the United States. There were no C. I. F. contracts (R. 61). The contracts provided that payments should be made on delivery on the docks at destination and "title to remain in seller until goods are fully paid for." In practice, however, such provisions were somewhat modified, for upon arrival the brokers advanced the contract price less their commissions and subsequently collected from the petitioner when the goods arrived at Xenia, Ohio, or within ten or fifteen days thereafter.

While en route to this country, the fibers were insured by the sellers who paid the premiums on marine insurance and generally paid one-half per cent of the insured value of war risk insurance. The sellers were the beneficiaries of such policies, although provision was frequently made for the protection of the interests of the brokers and the drawee consignee banks (R. 41, 69, 72, 77 and 86). The petitioner was required to pay any excess for war risk insurance and for any increased value insurance, if it desired the latter.

In shipping the fibers, the sellers either consigned the same to themselves, the brokers or a bank with a bill of lading and draft attached (R. 68, 71, 76, 81, 85). The brokers were notified of such shipments and, in turn, they passed this information on to the petitioner. Upon arrival at the port of entry, the brokers cleared the goods through the customs, supervised the unloading and weighing, made inspections for the petitioner and arranged for shipments to the petitioner's factory at Xenia, Ohio (R. 61, 69, 71, 76, 82, 86).

When the goods arrived in Xenia, the bales were placed in the petitioner's warehouses and left there in their original packages until the petitioner started them through its mills, at which time the bales were removed from the ware-

houses, the original packages broken and processing was actually started on the fibers. Simultaneously, the petitioner made appropriate entries on its books whereby such bales were transferred from its raw materials account to the goods in process account. Upon completion of the processing, another transfer was made on its books to the finished goods account (R. 43).

All of the fibers purchased by the petitioner were purchased for the sole purpose of meeting its manufacturing needs. No fibers were ever purchased for resale (R. 47). Having in mind that it took from three to six months for deliveries to be made after orders were placed, the petitioner tried to keep its business running "with a minimum working inventory" (R. 42). The petitioner attempted "to keep a backlog for that" (R. 42). Hence only such quantities of fibers were purchased and placed in petitioner's warehouses as were deemed necessary to assure the constant operation of its plant.

As stated by the petitioner, the questions presented to this court are, within the purview of Article I, Section 10, Clause 2, of the Constitution of the United States: 1. Was the petitioner the importer? 2. If so, had the fibers in question lost their character as imports when assessed for state property taxation? 3. Were those fibers brought into Ohio from the Philippine Islands ever imports?

SUMMARY OF ARGUMENT.

1. The contracts under which the petitioner bought fibers, including such modifications thereof as were developed in practice between the parties, show that the producers were required to deliver specified types and qualities of fibers to the petitioner on named United States docks; that such fibers were shipped under direction of the sellers, except that the petitioner occasionally expressed a desire that certain steamship lines be used; that the bills of lading with draft attached named the sellers, the sellers' brokers or their drawee banks as the consignees; that the cargoes were insured against loss at sea by the sellers or their brokers with loss payable to the sellers, the brokers and their drawee banks, as their interests might appear; and that the contracts provided that title should remain in the sellers until the goods were paid for by the petitioner, but this provision was modified in practice by the brokers advancing the contract price less commissions to the sellers and being paid by the petitioner within ten or fifteen days after the fibers arrived in Xenia. Under these conditions, it is contended that title has passed in the United States thereby causing the fibers to become mixed with the mass of domestic property and the immunity from state taxation lost.

2. The petitioner is a manufacturer and, as such, used quantities of imported fibers. It took from three to six months after an order was placed to get deliveries of such fibers. In order to keep its plant in constant operation, it was necessary for the petitioner to keep a "backlog" or supply of fibers in its warehouses. The petitioner always operated its business "with a minimum working inventory" and never bought fibers for the purpose of sale. Under

these circumstances, it is contended that the petitioner has used the ~~fibers just as truly as if it had broken the~~ original packages and started them through its mills. By so using the fibers, even if it be the importer, the petitioner has exhausted the tax free privilege of the imports and they are thereafter to be considered as domestic property subject to state taxation.

3. "Imports" within the meaning of Article I, Section 10, Clause 2, of the Constitution of the United States are articles brought into this country from some foreign country. The Philippine Islands are United States territory. Hence, such portions of the fibers used by the petitioner as came from the islands were not imports and the state of Ohio was free to impose the questioned assessments.

ARGUMENT.

Questions Presented.

The petitioner, by its specifications of error, has presented three questions to this court for determination.

A. Under the facts presented, did the petitioner acquire title to the fibers in question after their arrival in the United States?

B. If it be assumed that the petitioner was the importer, did it use the fibers in question in its business in such manner as to have caused them to have lost their immunity from state taxation?

C. Were those fibers which were brought into Ohio from the Philippine Islands imports within the meaning of Article I, Section 10, Clause 2, of the Constitution of the United States?

SUMMARY OF PERTINENT OHIO STATUTES.

Since the petitioner in its brief and in its specifications of error raises only three questions, all of which are dependent upon the construction and intent of Article I, Section 10, Clause 2, of the Constitution of the United States, it appears to be conceded that if on tax listing day the fibers under consideration were not immune from state taxation, then the assessments were in all other respects correctly made. We therefore deem it sufficient to summarize briefly the Ohio statutes under which the challenged assessments were made.

The petitioner is a taxpayer as defined in Section 5366, General Code of Ohio, and as such is required by Sections 5367 and 5370, General Code of Ohio, to return annually

its taxable property. Since the petitioner had taxable property in more than one county, it was required by Section 5378, General Code of Ohio, to file a combined or inter-county return. (R. 4a to 31).

In its returns, the petitioner is required to list, and the tax commissioner is required to assess, all taxable property which, as provided in Section 5328, General Code of Ohio, includes "all personal property located and used in business in this state." The term "used in business" is defined in Section 5325-1, General Code of Ohio, which provides in part:

> "Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. * * *"

The manner of listing raw materials by a manufacturer is found in Section 5385, General Code of Ohio, which reads:

> "A person who purchases, receives or holds personal property, of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, is a manufacturer, and, when he is required to return a statement of the amount of his personal property used in business, he shall include therein the average value estimated, as hereinafter provided, of all articles pur-

chased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto (separately listing finished products not kept or stored at the place of manufacture or at a warehouse in the same county therewith), which, from time to time, he has had on hand during the year next previous to listing day annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged."

The average value of such materials is computed as provided in Section 5386, General Code of Ohio, which, so far as pertinent, reads:

"Such average value shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer, on the last business day of each month the manufacturer was engaged in business during the year; adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year. Such result shall be the average value to be listed. * * *"

From the foregoing, it appears that it was the duty of the petitioner to have included in its returns for 1938, 1939 and 1940 the average value of the raw materials which it held in its Ohio warehouses during the calender years 1937, 1938 and 1939.

The Petitioner, Having Acquired Title to the Fibers in Question After Their Arrival in the United States, Was Not the Importer.

Article I, Section 10, Clause 2, of the Constitution of the United States, prohibits the states from levying any taxes on imported articles so long as such articles retain the character of imports. It has been firmly established, however, that when such articles are sold after arriving in the United States, they lose their character as imports. *Brown* v. *Maryland*, 12 Wheat., 419; *Waring* v. *Mayor, Etc., of Mobile*, 8 Wall., 110. We must therefore conclude that if the petitioner acquired title to the questioned fibers after their arrival in the United States the assessments should be sustained.

The petitioner contends that although the contract for the purchase of fibers all required delivery by the sellers at specified ports in the United States, title passed before the fibers reached the United States. Several cases are discussed by the petitioner in support of this contention. Without attempting to analyze these cases separately, it may be said that in each case the facts are easily distinguished from the instant case. For example, in *United States* v. *Andrews*, 207 U. S., 229, while the term "f. o. b. Manila" was used, the price was fixed as the price in Washington, D. C., plus freight from New York. The court found that the words "f. o. b. Manila" were therefore not used in their ordinary commercial sense (p. 241). The goods were delivered to a carrier designated by the consignee, the latter choosing the route. The bill of lading was to the consignee or order. It also appears that there was no reservation of title by the consignor (pp. 240 and 241). In our present case, the petitioner's contracts all

required delivery to be made on United States docks by the sellers. Title was specifically reserved in the sellers. While the petitioner sometimes indicated a preference of steamship lines, the evidence fails to show that there was any insistence upon such designation. Furthermore, the petitioner did not undertake to select the route. The bills of lading were to the sellers, their brokers and sometimes included a drawee bank. Under such conditions as we shall subsequently show, title remains in the vendor at least until delivery is made. The petitioner also relied upon *Norfolk and Western Railway Company* v. *Sims*, 191 U. S., 441. In the opinion in that case it was conceded "that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier."

Until such time as title to the goods passed to the petitioner, there was nothing more than a contract of sale. Sales were not made until the sellers delivered the goods on the specified United States docks. The completion of such sales after the goods had arrived in the United States terminated the immunity from state taxation. *Brown* v. *Maryland*, 12 Wheat. 419; *Waring* v. *Mayor, Etc., of Mobile*, 8 Wall., 110. The time when title passes must be ascertained from the contracts and surrounding circumstances. The petitioner's contracts do not call for the sale of specific goods. Only the type, quality and quantity of fibers are specified. Such fibers might have been produced by the sellers after the contracts were signed, or they might have been taken from a larger stock then or subsequently acquired by the sellers, or the sellers might have purchased the proper type and quality of fibers to fulfill their contracts with the petitioner. Although the bales

were marked, such marks did not show them to have been appropriated to the contract. Instead, they indicated the type of fiber in the bale or the name of the estate upon which it was produced. The contracts were therefore executory until the fibers arrived in the United States, were inspected by the brokers for the petitioner and unloaded at the docks and weighed.

Under both the common law and the Uniform Sales Acts, which, in general, follow the common law, if the contract requires the seller to deliver the goods f. o. b. at a specified point, title does not pass until such delivery is made.

The above principle was very clearly expressed in the case of *Westmoreland Coal Company* v. *Syracuse Lighting Company*, 145 N. Y. S., 420, 159 App. Div., 323.[1] In this case plaintiff had sold coal to the defendant, plaintiff agreeing to deliver the same on defendant's dock. The coal was loaded on barges and taken to the vicinity of defendant's dock awaiting the departure of other barges then unloading at the dock. While thus awaiting an opportunity to unload, the coal and barges were lost in a storm. It was contended that when the coal was loaded on the barges it was thereby appropriated to the contract and was thereafter at the buyer's risk. The court held that this may have been an appropriation by the seller, but until it made

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[1] In the case of *Westmoreland Coal Company* v. *Syracuse Lighting Company*, 145 N. Y. S., 420, 423, 159 App. Div., 323, it was said in the opinion:

"It is suggested that when plaintiff placed the coal on these boats there was an appropriation of it in fulfillment pro tanto of the executory contract for delivery of coal. While this may have been an actual appropriation by plaintiff to that end, yet it did not complete what it had agreed to do before title passed to the defendant. Delivery of the coal was as much a part of its duty as actual selection and appropriation of it. Delivery of the coal at the place specified in the contract was required to be made, and then only would the defendant's assent to such appropriation in part fulfillment of the contract be established. Delivery was not made. Therefore title had not passed to defendant."

delivery as agreed there could be no assent to such appropriation by the buyer. Delivery as specified, it was said, was as much a part of the seller's duty as appropriation to the contract, and since there was no delivery, title did not pass.

In the case of *Gordon* v. *American Tankers Corp.*, 286 *Mass.*, 349, 191 N. E., 51, propeller blades and heavy machinery were sold to be delivered on seller's wharf. Only part of the propeller blades had been placed on the wharf when the wharf collapsed. The court held that the contract being for the sale of specified articles for a single sum was entire and not separable. Since it required delivery by the plaintiff, only part of which had been made at the time of the loss, title had not passed.

Other courts have reached the same conclusion.

- *Yockey* v. *Norn*, 101 Mich., 193, 60 N. W., 685;
- *Neimeyer Lumber Co.* v. *B. & M. R. R. Company*, 54 Neb., 321, 75 N. W., 670;
- *Cross* v. *State*, 75 Ark., 522, 87 S. W., 1026;
- *Quisenberry* v. *Rucker*, 124 S. W., 274 (Kentucky);
- *Pfoh* v. *Porter*, 23 Calif. App., 59, 137 Pac., 44;
- *Zank* v. *Jones*, 178 Wis., 445;
- *Sidford & Greene, Inc.*, v. *Wehmeyer Coal Company*, 133 Misc., 22, 230 N. Y. S., 611;
- *Hettrick Manufacturing Company* v. *Srere*, 235 Mich., 306, 209 N. W., 97;
- *Garvan, Inc.*, v. *N. Y. Central & H. R. R.*, 210 Mass., 275, 96 N. E., 717;
- *Allen* v. *Wolf River Lumber Company*, 169 Wis., 253, 127 N. W., 158;
- *Brown* v. *Adair*, 104 Ala., 652, 16 So., 439;
- *Alabama National Bank* v. *Parker & Company*, 146 Ala., 513, 40 So., 987;
- *Tripp* v. *Wade*, 82 Fla., 325, 89 So., 870;
- *Faulkner* v. *Town of South Boston*, 141 Va., 517, 127 S. E., 380;
- *National Bank* v. *Dayton*, 102 U. S., 59;

Ormsbee v. *Machir*, 20 O. S., 295;
B. & O. S. W. Ry. Co. v. *Good, et al.*, 82 O. S., 278;
Rehr v. *Lumber Company*, 110 O. S., 208.

The foregoing conclusions receive substantial confirmation from the fact that the foreign sellers took out marine insurance on the fibers purchased by the petitioner, paid the premiums thereon and were named as beneficiaries.

Stearns v. *Grand Trunk R. R. Company*, 156 Mich., 145, 120 N. W., 572;
Collins v. *Oliver*, 299 Pa., 372, 149 Atl., 647; and
Christian v. *Moore*, 252 S. W., 1116 (Tex.).

Since all of the petitioner's contracts were landed contracts requiring the sellers to deliver the fibers on docks in this country, it follows that title did not pass to the petitioner until after the goods had arrived in the United States.

Even if the Petitioner Were to be Regarded as an Importer, it Used the Fibers in Such Manner as to Make Them Subject to State Taxation.

At the time of the adoption of the Constitution and for many years thereafter, the United States was primarily an agricultural nation engaged in the production of raw materials. It did relatively little manufacturing. Manufactured articles and finished products were imported from foreign countries to supply the United States market. It was realized that some form of protection had to be given the central and western states to prevent the Atlantic seaboard states from subjecting imports and exports of the former to taxation. For example, on August 6, 1787, in a debate on a motion to amend a draft of the proposed constitution, James Madison said that "It would be unjust to the states whose produce was exported by their neighbors to leave it subject to tax by the latter."

In a meeting of the convention as a committee of the whole on August 28, 1787, Gouverneur Morris stated that he thought it was necessary to require the net receipts of all state duties and imposts to be for the use of the United States treasury in order to prevent the Atlantic states from endeavoring to tax the western states.

In *Brown v. Maryland*, 12 Wheat., 419, Chief Justice Marshall said (p. 440):

> "Conceding to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interest, it cannot be conceded that each would respect the interest of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports.
>
> This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation."

See also *Woodruff v. Parham*, 8 Wall., 123.

Such potential inequities led to the adoption of Article 1, Section 10, Clause 2, of the Constitution of the United States, whereby the states relinquished the right to levy a property tax upon imports even though the imported property be physically located within the state on tax listing day.

It therefore appears that the object of the constitutional provision is to give the same price advantages to purchasers of imports in the inland states as are enjoyed by those in the seaboard states. This object of necessity has special application to sales to be made of imported articles. In *Brown v. Maryland*, 12 Wheat., 419, Chief Justice Mar

shall said that "The object of importation is sale; it constitutes the motive for paying the duties."

In *Mayor of the City of New York* v. *Miln*, 11 Peters, 102, it was said (p. 136) that sale is the object of all importation and that the right to import goods implies the privilege to sell the imported goods.

In *Bowman* v. *Chicago & Northwestern R. Company*, 125 U. S. 465, 499, it was said that the right of importation necessarily implied the right of the importer to sell the unbroken packages. The same conclusion was reached in *Rhodes* v. *State of Iowa*, 170 U. S. 412, 416.

In all the reported decisions we have been able to find dealing with the rights of the states to tax in any manner imported goods, the facts clearly disclose that the express object of the importation was sale. It appears to have been the view of the court that such imports, while awaiting resale in their original packages in the hands of the importer, are not to be considered as having come to rest in this country, but are regarded as being temporarily held in storage pending further shipment or transfer of title. This was the view of Chief Justice Taney in the *License Cases*, 5 How. 504, 575.[2]

[2] In his opinion in the *License Cases*, 5 How. 504, at page 575, Chief Justice Taney said:

"The immense amount of foreign products used and consumed in this country are imported, landed, and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the state in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the state, but by citizens of other states, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely in transitu, and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. And a tax upon them while in this condition, for state purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a state."

When imported articles have come to rest in a state and are not being held for sale, even though belonging to the importer and remaining in their original packages, it appears that such articles are not embraced in the provisions for immunity. This view finds substantial support in *Brown* v. *Maryland*, 12 Wheat., 419. In that case (p. 441), in answer to the question of how long imports continued to be such after their arrival in this country, it was said that the immunity continued until the importer had so acted upon the imported articles as to have caused them to become incorporated and mixed up with the mass of property in the country. It was then stated (p. 442) that while the imported articles remained the property of the importer in his warehouses in the original packages in which they were imported, taxation by the states was prohibited. In the paragraph that follows, however, it becomes plain that the court had reference to articles being held awaiting sale. On page 443 the court held that the importer has used the privilege he has purchased when he has mixed the imported articles with the common mass. The same observations, it was said, apply to plate, or other furniture used by the importer. Thus, the court recognized the difference between articles imported for sale and imported articles used by the importer, the latter being regarded as having come to rest and as being mixed with the mass of property within the state.

In *Wynne* v. *Wright*, 18 N. C., 19, the court recognized that imports became amalgamated with other goods of the

state by being withdrawn from the market as subjects of commerce and diverted to the private use of the importer.[1]

In *Tres Ritos Ranch Company v. Abbott*, 44 N. Mex., 556, 105 Pac. (2d), 1070, it has been recognized that if the importer, while retaining the goods in original packages, makes use of such goods in his domestic business, such use may constitute a mingling with local property and state taxes may thereafter be levied.

In the case of *Baldwin* v. *Seelig*, 294 U. S., 511 (pp. 526 and 527), this court recognized that the original package doctrine is not an ultimate principle, but is only an illustration of a principle.

It has frequently been held that original packages may be broken by accident or for inspection purposes without losing the privilege of immunity.

- *Re McCallister*, 51 Fed., 282;
- *United States* v. *Five Boxes of Asafoetida*, 181 Fed., 561;
- *United States* v. *Nine Boxes of Asafoetida*, 181 Fed., 568;
- *Wind* v. *Iler*, 93 Ia., 316, 61 N. W., 1001;
- *Greek-American Sponge Company* v. *Richardson Drug Company*, 124 Wis., 469, 102 N. W., 888;
- *Vermont Farm Machine Company* v. *Hall*, 80 Ore., 308, 156 Pac., 1073.

[1] In *Wynne* v. *Wright*, 18 N. C., 19, the court, in analyzing the opinion in *Brown* v. *Maryland*, 12 *Wheat.*, 419, concluded that the privileged status of imports ceased when they were mixed with or incorporated into the general mass of property in the state by a resale thereof; by breaking the original packages or if "he keep a particular article, as a piece of plate or jewelry, for his own use." Quoting from the opinion, it was said:

> "But when thus mixed, the right of the importer does not pass to his assignee, nor does the former exemption from taxation on a first sale adhere to the goods upon a re-sale. Nay, although the importer continued to be the owner, the goods become amalgamated with the other goods of the state, by either being withdrawn from the market, as subjects of commerce, and diverted to his private use, or by being offered for sale in small parcels, or in a peculiar manner, as by auction, by hawking, or otherwise by retail."

These decisions are evidently based upon the principle that such goods are still to be regarded as being in transitu in intact condition.

The original package doctrine further fails in literal application when the imported articles are such that they can not be wrapped, such as, for example, lumber, oil, large animals and the like. This was distinctly recognized by Justice Daniel in his opinion in the *License Cases*, 5 How., 504, 612.[4]

The evidence in the instant case shows that the petitioner purchased fibers solely for its own use, never for sale. It was impracticable to buy fibers a bale at a time to meet the immediate needs of its mill. It took from three to six months to get delivery after an order was placed. The undisputed testimony shows that the petitioner did not carry any more inventory than was actually needed, but due to the uncertainty of deliveries, it attempted "to keep a back log for that." It attempted to operate "with a minimum working inventory" (R. 16). In other words, when the imported goods reached the plant they were immediately used, in that they were essential to the continuous daily operation of petitioner's plant.

[4] In the *License Cases*, 5 How., 504, Justice Daniel said in his opinion (p. 612):

"With regard to this phrase, 'broken up and mingled with the mass of property', so often appealed to with the view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity. With respect to the phrase above mentioned, it may be retorted, that a person may import a steam engine, a piano, a telescope, or a horse, and many other subjects which could not be broken up in order to be mingled with the general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning) the appropriation of a subject imported in absolute private right and enjoyment, either positively or relatively, it surrenders the whole matter in dispute, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, is bound to contribute to the support of the government which yields this protection, whether he shall have imported that property, or purchased it at home."

Not only were the imported fibers immediately used to assure the steady, uninterrupted operation of the factory, but they were mingled with other raw material used by the petitioner. Some of the fibers were produced in this country, some in the Philippines and some had been imported from foreign countries, but all were placed in petitioner's raw material warehouses, which were used as hoppers or reservoirs to feed steadily petitioner's machinery. On the books they were also mingled. Three accounts were kept by petitioner under the captions of "raw material", "goods in process" and "finished goods." In the raw materials' account all raw materials were listed, including imported fibers. Such use of the imported goods, we believe, constitutes a mingling with local property causing the imported fibers to lose any immunities they may have had from state taxation.

Goods Brought Into Ohio from the Philippine Islands, Which Are United States Territories, Are Not Imports Within the Meaning of Article I, Section 10, Clause 2, of the Constitution of the United States.

The stipulation (R. 89) shows that approximately sixteen and one-half per cent of the fibers in question were produced in the Philippine Islands and shipped into Ohio. While articles brought from one state into another are sometimes loosely referred to as having been imported, the inhibition found in Article I, Section 10, Clause 2, of the Constitution of the United States is confined to goods that are brought into this country from a foreign country. Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat., 419, 437, said that imposts or duties on imports are customs or taxes levied on articles brought into a country. Articles

can only be brought into a country from a point without the country, in other words, from some foreign country.

In the case of *Woodruff v. Parham*, 8 Wall., 123, it was held that goods brought into one state from another state of the Union were not imports. From the reasoning employed, it appears that the result would have been the same if the goods had been shipped from any United States territory under the jurisdiction of Congress into one of the states. The term "imports" was clearly limited to those articles which were brought into the United States from a foreign country.

It has repeatedly been held that the term "imports" applies only to articles brought from foreign countries.

> *Howe Machine Company* v. *Gage*, 100 U. S., 676;
> *Pittsburg & Southern Coal Company* v. *Louisiana*, 156 U. S., 590, 600;
> *Patapsco Guano Company* v. *Board of Agriculture*, 171 U. S., 345, 350; and
> *Cunard Steamship Company* v. *Mellon*, 262 U. S., 100, 122.

The petitioner suggests that the expression "brought into the United States" should be confined to articles brought into the forty-eight states themselves. As authority for this statement, there is cited an article from 12 Harv. L. Rev., 464 (1899), discussing the meaning of the term "United States" as used in the Constitution. Petitioner concludes that "an article is an import irrespective of the place of its origin so long as that place lies outside the territorial limits of the forty-eight states which compose the federal Union." If this be so, then products of Alaska, Porto Rico, Hawaii and even Washington, D. C., would be regarded as "imports" when shipped into one of the forty-eight states. Two years after the Harvard Law

Review article appeared, this court had before it, as stated at the outset of the opinion in the case of *DeLima* v. *Bidwell*, 182 U. S., 1, "the single question whether territory acquired by the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws." The tariff laws in question were contained in the Tariff Act of July 24, 1897 (30 Stat. at L. 151, chap. 11). Duties were imposed upon articles imported from foreign countries. Ample authority for the enactment of the Tariff Act was contained in Article I, Section 10, Clause 2, of the Constitution of the United States, as construed by the Supreme Court in *Brown* v. *Maryland*, 12 Wheat., 419, and the several decisions thereafter. The court reached the conclusion that a "foreign country" was one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States. The island of Porto Rico, having been ceded to the United States by the treaty with Spain, was no longer a "foreign country" for the purpose of providing duties upon imports. The opinion reviews several other cases at length to show that mere military occupation and rule of a foreign territory are insufficient. Goods shipped therefrom continue to be imports until a treaty has been ratified.

This follows the decision in the case of *Cross* v. *Harrison*, 16 How., 164, wherein the territory of Upper California, now the state of California, following the treaty of peace was recognized as being territory of the United States to which all of its tariff laws applied and foreign goods were liable for import duties.

In the case of *Fleming* v. *Page*, 9 How., 603, it appears that during the war with Mexico the Port of Tampico was captured and occupied by the United States. Duties were

levied on goods which were shipped from this port to the United States. Plaintiffs sought to recover those duties claiming they had been illegally charged for the reason that when the goods were shipped, Tampico was subject to the sovereignty and dominion of the United States, hence it was no longer part of a foreign country, and that imports were levied only upon goods brought from a foreign state. The court came to the conclusion that although Tampico had been occupied by the military authorities, it was occupied as the territory of a foreign hostile nation and was therefore a foreign port when this shipment was made. While it was held that the duties were properly levied, a strong inference arises that if the port of origin had been ceded territory, after the ratification of the peace treaty, such port would thereafter have been regarded as a domestic port. Similar conclusions were reached in *DeLima* v. *Bidwell*, 182 U. S., 1; *Dooley* v. *United States*, 182 U. S., 222, and *Faber* v. *United States*, 221 U. S., 649.

Prior to the Spanish-American War, the Philippine Islands were Spanish territories. A treaty of peace was ratified on April 11, 1899, whereby the Philippine Islands and other territories were ceded to the United States. As has been previously shown, upon this ratification the Philippine Islands ceased to be a foreign country and became territory of the United States. As a part of the United States, goods shipped therefrom to Ohio are not goods brought into the United States from a foreign country. Consequently, they are not imports.

The above conclusion is fully supported by the case of *Fourteen Diamond Rings* v. *United States*, 183 U. S., 176. In that case, diamonds were acquired in the Philippines after ratification of the peace treaty with Spain. They

diamonds, upon being brought into the United States without payment of duty, were seized by the federal authorities. This court concluded that the Philippines were, at that time, domestic territories and the tariff sought to be collected applied only to imports. Imports were regarded as being articles brought into the limits of this country from a foreign country.

The same question here presented was presented to the Supreme Court of California in the case of *Dant & Russell, Inc., v. Board of Supervisors*, 133 Pac. (2d), 817. It was there held that the word "imports" referred exclusively to goods shipped from a foreign country and that it has long been settled that the Philippine Islands are not a foreign country. Hence, the articles brought into the State of California did not constitute imports.[5]

There remains to be considered the question of the effect of the subsequent steps taken by the United States preparatory to granting independence to the Philippine Islands.

The Philippine Commonwealth was established in 1935 under authority of the Independence Statute of 1933, Title 48, U. S. C., Sections 1231 to 1256. Under authority of this act, a constitution was adopted and a commonwealth government set up but independence was not to ~~become~~ effective until July 4, 1946. It has been repeatedly held that a

[5] In discussing the question here presented, it was said in the case of *Dant & Russell, Inc.*, v. *Board of Supervisors*, 133 Pac. (2d), 817:

"Petitioner contends that the taxes are invalid on the ground that they were imposed on imports in violation of the provisions of Article I, Section 10, of the Constitution of the United States that 'No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports * * *.' The word 'imports', however, as used in this section refers exclusively to goods shipped from a foreign country * * * (citations) * * *, and it has long been settled that the Philippine Islands are not a foreign country but an unincorporated territory of the United States. * * * (citations) * * *. It follows that the lumber in question does not constitute imports, and it is immaterial whether it can be regarded as having been in original packages unsold at the time the taxes were levied."

conquered territory held by the military authorities continues to be a foreign state or territory until ratification of a peace treaty.

New Orleans v. *New York Mail S. S. Co.*, 20 Wall., 387, 393;
Cross v. *Harrison*, 16 How., 164;
Dooley v. *United States*, 182 U. S., 222;
Armstrong v. *United States*, 182 U. S., 243, 244.

By the same reasoning, it may be said that the Philippine Islands continue to be United States territories and possessions at least until their independence becomes complete on July 4, 1946.

In *Cincinnati Soap Company* v. *United States*, 301 U. S., 308, Justice Sutherland said that the sovereignty of the United States over the Philippine Islands had not been withdrawn by the passage of the Philippine Independence Act and that, so far as the United States is concerned, the Philippine Islands are not yet foreign territory.[6]

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[6] In *Cincinnati Soap Company* v. *United States*, 301 U. S., 308, 319, Justice Sutherland, speaking for the court, said:

"But it is contended that the passage of the Philippine Independence Act of March 24, 1934, chap. 84, 48 Stat. at L. 456, 48 U. S. C. A., Section 1231, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; and that since then, whatever may have been the case before, the United States has been under no duty to make any financial contribution to the islands. Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory."

CONCLUSION.

From the foregoing, it is apparent that title to the fibers constituting the subject matter of this controversy passed to the petitioner after delivery on the specified docks in this country. Hence, the petitioner was not the importer. The imports themselves lost their tax immunity on such passing of title and thereupon became proper subjects of taxation by the state of Ohio.

It is also evident that even if the petitioner had been the importer, it so acted upon the imported goods by using them in its manufacturing business that such goods must be regarded as having become incorporated in the general mass of property within this country and therefore subject to state taxation.

Although the Supreme Court of Ohio found it unnecessary to determine whether the goods brought into Ohio from the Philippine Islands were imports, if it had considered this point, in all probability it would have followed the dissenting opinion and would have reached the conclusion that imports within the meaning of Article I, Section 10, Clause 2, of the Constitution of the United States refer only to articles brought into this country from a foreign country. Since the Philippine Islands are still United States territory, goods brought from such islands into the state of Ohio are not immune from taxation as imports.

It follows that the state of Ohio having had the power to tax the goods in question, the assessments should be sustained.

Respectfully submitted,

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